IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1490

J. R. LEWIS, and HAROLD H. GALLIETT, JR.,
CITIZENS AND TAXPAYERS OF THE STATE OF ALASKA,

Appellants,

v.

STATE OF ALASKA, *et al.*, and COOK INLET REGION, INC.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF ALASKA

MOTION OF COOK INLET REGION, INC. TO DISMISS OR AFFIRM

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Cook Inlet Region, Inc. (Cook Inlet) moves the Court to dismiss the appeal herein as not within the appellate jurisdiction of this Court, or alternatively to affirm the judgment of the Supreme Court of the State of Alaska; considering the jurisdictional statement as a petition for a writ of certiorari, Cook Inlet respectfully submits that the petition should be denied.

STATEMENT

This appeal essentially raises the question whether an act of the Alaska legislature authorizing the State to enter into a land settlement with the United States and Cook Inlet (as authorized by an act of Congress) is invalid as contrary to the State Constitution. The Supreme Court of the State of Alaska held the Act valid under the Alaska Constitution.

The Alaska Native Claims Settlement Act of 1971 (ANCSA), 85 Stat. 688, 43 U.S.C. 1601, *et seq.* provided the mechanism for extinguishment of the land claims of Native Alaskans in return for a right to select 40 million acres of federally held land and a payment of $962.5 million. In most of the State, ANCSA worked reasonably well. Within the Cook Inlet region, however, which includes Anchorage, the State's largest city, prior state selections of federal land left little appropriate land for selection by Cook Inlet, the regional corporation established under ANCSA for natives of that region.[1] Largely as a result of this shortage, Cook Inlet (and the Alaska Native Village corporations in the Cook Inlet region) sued the Secretary of the Interior in the United States District Court for Alaska seeking, among other remedies, to invalidate prior selections by the State of Alaska in order to make adequate land available to the regional corporations for selection. The district court ruled against the

[1]The State selections had been made under Section 6(b) of the Alaska Statehood Act, Act of July 7, 1958, 72 Stat. 339, note preceding 48 U.S.C. 21. The Secretary of Interior foreseeing that there would be insufficient lands left in some regions for native selection, four years prior to ANCSA imposed a "freeze" on future State selections. This action was upheld, over State protest, in *Alaska v. Udall*, 420 F.2d 938 (C.A. 9, 1969), *cert. den.*, sub nom. *Alaska v. Hickel*, 397 U.S. 1076, (1970). Not decided then, nor since then, was the validity of land patents issued to the State prior to the freeze, in view of the unresolved claims of Native right.

plaintiffs and an appeal is pending before the United States Court of Appeals for the Ninth Circuit.[2]

In order to settle the law suit and the underlying problem of insufficient federal land available for native selection in the Anchorage area, a tripartite solution was negotiated. The United States agreed to make additional lands available to the State of Alaska in return for Alaska's conveyance to the United States of lands in the Anchorage area. Cook Inlet would choose a portion of its entitlement from these re-acquired federal lands. Cook Inlet would in turn dismiss its suit with prejudice, and forego its claims against lands previously chosen by the State, wherever located. The settlement would not only end the litigation but would serve the additional purpose of allowing more rational land ownership patterns for all three parties.

To effectuate the agreement, Congress enacted Section 12 of the Act of January 2, 1976, 89 Stat. 1150, note after 43 U.S.C. 1611.[3] The Act, in addition to the

[2]*Cook Inlet, et al. v. Andrus*, No. 75-2232.

[3]The preamble to Act of January 2, 1976 sets forth the purpose of the Act:

> "* * * to provide for the settlement of certain claims, and in so doing to consolidate ownership among the United States, the Cook Inlet Region, Incorporated (hereinafter in this section referred to as the 'Region'), and the State of Alaska, within the Cook Inlet area of Alaska in order to facilitate land management and to create land ownership patterns which encourage settlement and development in appropriate areas * * *"

Appellants refer to the settlement as having been made under Section 22(f) of ANCSA (J.S. 7), which requires equal value in exchanges. The exchange at issue here, however, is not under 22(f) of ANCSA but the special legislation of the United States described above, and of the State described [redacted] *infra*.

conditions outlined above, specified the lands to be conveyed by each party and provided that the conveyances by Alaska to the United States "shall not be subject to the provisions of section 6(i) of the Alaska Statehood Act (72 Stat. 339)."

Section 6(i) of the Alaska Statehood Act provides that grants made by the United States to the State shall include mineral deposits and:

> * * * "The grants of mineral lands to the state * * * are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all the minerals in the lands so sold * * * Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: Provided, that any lands or minerals hereafter disposed of contrary to the provisions of this section *shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.*" (emphasis added)

Congress' waiver of section 6(i) of the Statehood Act was thus designed to remove any doubt that might exist about the power of Alaska to reconvey land fully to the United States without a reservation of mineral rights, so that those lands with any minerals they might contain could be made available for selection by Cook Inlet in the same manner as other federal lands.

On March 11, 1976, after public hearings and a unanimous recommendation from the federally created State-Federal Joint Land Use Planning Commission, Alaska enacted Chapter 19, Session Laws of Alaska (SLA) 1976 which authorized the governor to convey to

the United States the lands agreed to in the settlement agreement.[4] The Act specifically provided (Section 2):

> "The conveyance shall pass all the State's right, title and interest in the land, including the mineral subsurface estate not withstanding any other provisions of the law."

Prior to the Alaska legislature's action, this suit was brought by two individual "citizens and taxpayers" of the State of Alaska to enjoin the State's participation in the Land Settlement. After the legislature enacted Chapter 19 the appellants continued their suit. They argued that Chapter 19 violated the Alaska Constitution as amended by the Statehood Act.

The Alaska Constitution did not require reservations of mineral interests in conveyances by the State but expressed the State's agreement to such conditions on alienation of land as might be imposed by Congress in the Statehood Act (Art. VIII, Sec. 9; Art. XII, Sec. 13). Section 8(b) of the Alaska Statehood Act called for a referendum on whether Alaska should immediately be admitted into the Union as a state and provided that in the event of the peoples approval of statehood and of the provisions of the Statehood Act, the Alaska Constitution "shall be deemed amended accordingly". Appellants argue that Section 6(i) of the Statehood Act referring to the disposal of mineral lands thus became part of the Constitution of the State and could be waived neither by Congress nor the State legislature.

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[4]Appellants attempt to discredit the settlement as unfair to Alaska (J.S. 8-10). We know of no factual basis for the figures cited and appellants give no source for their figures. The fairness of the exchange has been assured by negotiation and detailed legislative review. The evaluation of the lands exchanged is, of course, not an issue before this Court.

The Superior Court of the Third Judicial District of Alaska (Anchorage) agreed, and enjoined the settlement (J.S. App. A, 1-10). The Supreme Court of Alaska, in a thorough opinion (two justices dissenting on the merits and one dissenting solely on the standing of plaintiffs to sue) reversed (J.S. App. B, 11-46).

The Court concluded that appellants had standing to sue (J.S. App. B, 15-18), and in light of its holding on the merits did not rule on whether the United States was an indispensable party (*id.* p. 12, n. 1).[5] The court then reviewed in detail the history of the Alaska Constitution and the subsequent Statehood Act. The court concluded that the "shall be deemed amended" language of the Statehood Act did not literally amend the Alaska Constitution but prohibited Alaska's alienation of mineral lands (without a reservation of minerals) unless Congress approved such an alienation (*id.* pp. 18-25). The court concluded (*id* at 31):

> "* * * We hold that a constitutional amendment is not mandated, and that legislative approval of the Cook Inlet land exchange is sufficient once Congress consented to lifting the restrictions imposed against alienation of mineral rights."

The court finally rejected appellants' arguments that Chapter 19 violated the local and special legislation provision of the Alaska Constitution (J.S. App. B, 31-34).

The dissent on the merits (*id.* 34-46) argued that section 6(i) of the Statehood Act literally became a part

[5]The United States was not joined as a party but it did present an *amicus curiae* brief to the Supreme Court of Alaska supporting the position of the State and Cook Inlet. The brief was returned as untimely filed. We are lodging a copy of that brief with the Clerk. We know of no source for appellants' unsupported statement (J.S. 19) that the Department of Interior has considered Section 6(i) as incorporated in Alaska's Constitution at the time of statehood.

of the Alaska Constitution upon the people's acceptance of statehood and that Chapter 19 violated that State constitutional provision. A second dissent (J.S. App. B, 46) would not have reached the merits because of appellants lack of standing to maintain their action.

ARGUMENT

I.

THIS CASE IS NOT WITHIN THE "OBLIGATORY" OR APPELLATE JURISDICTION OF THIS COURT.

1. Under 28 U.S.C. 1257, this Court has appellate jurisdiction (as opposed to certiorari jurisdiction) over final decrees of the highest court of a state which

> "(1) * * * [draw] in question the validity of a * * * statute of the United States and the decision is against its validity"

or

> "(2) * * * [draw] in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * or laws of the United States, and the decision is in favor of its validity."

The Supreme Court of Alaska has done neither.

Section 6(i) of the Alaska Statehood Act, given its broadest meaning,[6] did no more than require as a condition of federal grants of mineral lands to Alaska that Alaska only dispose of such lands subject to a reservation of minerals. The remedy for violation of this condition, stated by Congress as part of the condition, is forfeiture of the land to the United States under "appropriate proceedings instituted by the Attorney

[6]See discussion at pp. 10-13 *infra* to the effect that the provision does not apply to transfers to the United States.

General for that purpose in the United States District Court for the District of Alaska". Congress, in enacting Section 12 of the Act of January 2, 1976, specifically waived the application of Section 6(i) to this conveyance.

The Supreme Court of Alaska in holding that 19 SLA 1976 did not violate Alaska's Constitution, did not draw into question the validity of Sections 6(b) and 6(i) of the Statehood Act imposing the limitation nor of Section 12 of the Act of January 2, 1976, waiving it, much less render a decision against the validity of an act of Congress. The Court did hold that Congress in using the phrase "deemed amended" did not intend by its own act *literally* to amend the Alaska Constitution. This would be beyond Congress' power. The Court held (J.S. App. B, 25):

> "* * * It seems self-evident that the Congressional restraints on alienation were intended by Congress to be binding only to the extent required by that body. This also was the intent of those who agreed upon and adopted the Alaska Constitution by vote."

The Court concluded (*id.* at 31):

> "* * * We hold that a constitutional amendment is not mandated, and that legislative approval of the Cook Inlet land exchange is sufficient *once Congress consented to lifting the restrictions imposed against alienation of mineral rights.*" (emphasis added)

At most, the Alaska Supreme Court interpreted the Statehood Act as not requiring a state constitutional amendment to dispose of mineral lands *to the United States* once Congress had specifically waived the condition imposed in the Statehood Act. This was "construction of federal law and not a holding of unconstitutionality". *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 290. No federal law was held invalid and no state law was put above a federal law or the Constitution.

This case is thus not properly within the appellate, mandatory, jurisdiction of this Court.[7]

2. No substantial federal question is presented by the decision below. The decision of the Alaska Supreme Court deals primarily with a matter of local law, whether a state constitutional amendment is required to enter into a settlement clearly approved by Congress. If Congress had not waived the requirements of Section 6(i) of the Statehood Act a federal question, whether the Statehood Act barred such a transaction, might have been presented. But in stating specifically in the 1976 Act that the conveyances made to the United States shall not be subject to Section 6(i) limitations, Congress itself removed any federal involvement in the question of whether Alaska did or did not need to amend its Constitution prior to conveying the land to the United States. Under these circumstances, the decision of the Supreme Court of Alaska that an act of the Alaska legislature did not offend the Alaska Constitution, should not be disturbed.

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[7] This case is not like *Metlakatla Indian Community v. Egan*, 369 U.S. 45, and *Organized Village of Kake v. Egan*, 369 U.S. 60 relied upon by appellants (J.S. 3). In those cases, the Supreme Court of Alaska had held invalid a federal regulation, issued under an Act of Congress, permitting certain Indian groups to use fish traps. The State court held the Act of Congress to have been superceded by a State statute enacted after statehood. The conflict between federal and state law, and the invalidation of federal law by the State court was apparent. Nor does *Reconstruction Finance Corporation v. County of Beaver, Pennsylvania*, 328 U.S. 204, also relied upon by appellants (J.S. 3), support appellate jurisdiction here. In *Reconstruction Finance Corporation*, the Supreme Court of Pennsylvania had upheld a state tax on machinery as a tax on real estate. The federal law prohibited taxes on personal property of the Corporation. This Court held that the conflict between the State and federal concept of personal property presented a substantial federal question. As we discuss in the next section, Congress' express waiver of Section 6(i) here removed any substantial federal question.

II.

IF THE JURISDICTIONAL STATEMENT IS CONSIDERED AS A PETITION FOR A WRIT OF CERTIORARI, THE PETITION SHOULD BE DENIED

Certiorari should be denied because, as shown above, there is no substantial federal question. Certiorari should also be denied because the decision of the Supreme Court of Alaska is correct.

1. The Alaska court has demonstrated in detail that Alaska's Constitution has not been amended in fact or by operation of law to include Section 6(i); that neither Congress nor the citizenry of Alaska intended to impose a limitation on the State's disposal of land that could not be removed by Congress. In support of this point, we rely on the opinion of the Supreme Court of Alaska, (J.S. App. B, 18-31).

2. There are, however, additional reasons why the decision below is correct. To begin with, Section 6(i) of the Statehood Act even if literally incorporated in the Alaska Constitution would not require the State to reserve minerals in *a return of land to the United States.* Both the history of the section and its language show that this is so.

a. It was long federal policy in grants of land to the states or railroads to reserve mineral lands. See *United States v. Sweet,* 245 U.S. 563 (1918). As a result of the retention of mineral lands, a federal mineral law grew up which allowed free exploration of mineral lands leading to patents once a discovery had been made. See Hibbard, *A History of the Public Land Policies,* page 517, *et seq.* (1939); Act of May 10, 1872, 17 Stat 91, 30 U.S.C. 22. Later, the emphasis was changed to Government leases to mineral producers. See 30 U.S.C. 291, *et seq.*, 30 U.S.C. 351 *et seq.*

Section 6(i) of the Alaska Statehood Act conditioned the grant of federal mineral lands to Alaska with the provision that conveyances by Alaska shall reserve the minerals for leasing by the State.[8] The condition assured that mineral development (by state leases) would continue much as it had previously in the State by federal leases. The condition serves no purpose in a transfer back to the United States, as the lands received by the United States would be subject to all relevant federal law and no disparity would be created.[9] The inapplicability of the condition is even clearer here, where an *exchange* between Alaska and the United States is at issue. The lands received by the United States from the State become subject to federal law and available for Native selection along with other available federal lands. In turn, equivalent lands will be ceded by the United States to Alaska which become subject to the limitations of Section 6(i).

b. The need for reconveyance between Alaska and the United States underscores the artificiality of applying 6(i) to such transactions. The United States, in fulfillment of its obligations under the Statehood Act, is required to convey more than 100 million acres of land

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[8]The language of Section 6(i) comes from the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. 870b (as amended), which to alleviate title problems created by federal reservation of mineral lands extended certain federal land grants to include mineral lands. In doing so, the 1927 Act provided that the States in conveying mineral lands received from the United States shall reserve the minerals, which shall be leased for support of public schools. The 1927 Act like section 6(i) provided that any conveyances in violation of that requirement would be subject to forfeiture to the United States by appropriate proceedings instituted by the Attorney General.

[9]All conveyances are, of course, subject to existing mineral leases.

to the State. Under the Alaska Native Claims Settlement Act, 40 million acres of surface and subsurface estates must be conveyed to the native corporations. Additional responsibilities devolve on the Secretary of the Interior to classify lands for various public purposes. An interpretation of Section 6(i) that precludes adjustment of land through conveyances between the two sovereigns condemns them to their past mistakes. Congress (in Section 22(f) of ANCSA, 43 U.S.C. 1621 (f)) and the Alaska Legislature (in, for example AS 38.95.060 as well as 19 SLA 1976) have recognized the need for such intersovereign transfers for the purpose of land management and consolidation.

c. That Section 6(i) has no application in a transfer to the United States is not only clear from its purpose, but from its language. The only penalty provided for violation by the State of the provisions of 6(i) is forfeiture of the land to the United States if the Attorney General institutes an appropriate action in federal court. Such a forfeiture would, of course, insure that the United States received the land and the minerals. The forfeiture provision is thus totally inconsistent with an intent of Congress to require the State to reserve minerals in a return of land to the United States. In real property terms, 6(i) created in the United States a power of termination.[10] Whatever the restraint on the conveyance of lands to third parties, Section 6(i) cannot be interpreted as a bar to the reconveyance of lands to the Federal Government itself because the United States is the grantor and holder of the power of termination. Indeed, under the doctrine of merger, the power

[10]See 1 American Law Institute *Restatement of The Law of Property*, Section 24, Comment *b* at 59 *et seq.* (1936); and 2 Powell, *The Law of Real Property*, Paragraph 188 at 54 et seq. (1975).

disappears upon the reconveyance when the estates unite. 2 Powell, *supra* paragraph 312 n. 1 at 665; see also 5 Powell, *supra*, paragraph 683 at 223-224.

Since Section 6(i) does not by its terms expressly apply to a transfer between sovereigns, and since its remedy is inconsistent with such a purpose, it should not be interpreted as having that meaning. It is an " 'old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign' 'without a clear expression or implication to that effect' ". *Hancock v. Train*, 426 U.S. 167, 179 (1976). See also *United States v. United Mine Workers of America*, 330 U.S. 258, 272 (1947).

III.

THE JURISDICTIONAL STATEMENT SHOULD ALSO BE DENIED BECAUSE THE APPELLANTS ARE WITHOUT STANDING TO SUE.

The Supreme Court of Alaska held, one judge dissenting, that the appellants' have standing to sue (J.S. App. B, 15-18, 46). It did so as a matter of State law in view of "the strong policy favoring review of alleged specific [State] constitutional violations by state officials. * * *" (*id.* at 17-18). But appellants now base their case not on a violation of their State constitution but a violation of the condition imposed by Congress in Section 6(i) of the Statehood Act. Congress, has provided a single remedy for violations of that Act—forfeiture upon suit brought by the Attorney General in the United States District Court for the District of Alaska (see p. 4 *supra*). If 6(i) has literally become a part of the Alaska Constitution as appellants argue, so has its remedy. That Section 6(i) limits enforcement to suits brought by the Attorney General of the United States, is not accidental.

If citizens at large are allowed to bring suits under 6(i), titles could be disquieted throughout the State. The role that Congress vested in the Attorney General to enforce the forfeiture and Congress' own power to relieve the condition of forfeiture should be respected.[11]

IV.

CONCLUSION

Congress and the State of Alaska have painstakingly worked out a solution to native claims in the Anchorage area—a solution that quiets titles throughout the State. This solution has now been delayed for a considerable time by this suit. The appellants have been fully heard and their suit has properly been rejected by the highest court of the State. The settlement should now be allowed

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[11]Compare *Calhoun v. Harvey*, 379 U.S. 134, 194-195, prohibiting suits by individual union members to contest union elections, in light of statutory provisions lodging such authority in the Secretary of Labor.

See *Maryland v. The Baltimore & Ohio R.R. Co.*, 3 How. 534 (1845). In a suit by county commissioners for forfeiture of railroad funds because of a deviation in route, this Court held that the State, which in that suit had established and waived the forfeiture provision was the only party at interest. The Court held that the legislature had the power to change its policy, upon discovery that it was a faulty one, and to release the railroad from its obligation as to the route and monetary forfeiture; that the power to release a penalty or forfeiture is within the power of the enacting body, and that neither citizens nor the county may interfere with that exercise. The court reasoned that otherwise the county would be allowed to enforce a forfeiture which the state, the enacting body, had found to be contrary to public policy. *Id.* at 549-550.

to proceed. The jurisdictional statement should be dismissed for want of a substantial federal question or, in the alternative, the decision of the Supreme Court of Alaska should be affirmed; treating the jurisdictional statement as a petition for certiorari, the petition should be denied.

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